

JOINT AGENCY SUMMARY
NORTHEAST HYDROELECTRIC LICENSING WORKSHOP ON
INTEGRATING STATE PROCESSES

Manchester, New Hampshire
March 6 & 7, 2002

Participants:

Federal Energy Regulatory Commission
New York State Department of Environmental Protection
New York State Department of State
New Hampshire Department of Environmental Services
New Hampshire Office of State Planning
Vermont Agency of Natural Resources
Maine Department of Environmental Protection
Massachusetts Department of Environmental Protection
Massachusetts Executive Office of Environmental Affairs

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The meeting for the northeast was held March 6 and 7, 2002, in Manchester, New Hampshire. Representatives from the 401 and CZM certifying agencies for New York, New Hampshire, Vermont, Maine, and Massachusetts attended. Pennsylvania was invited, but declined to attend. Representatives from Central Vermont Public Service, FPL Energy, Public Service Company of New Hampshire, Northeast Utilities, the National Park Service, and the U.S. Fish and Wildlife Service attended as observers. The list of individuals in attendance is attached as Appendix A.

To begin the workshop, Commission staff outlined the FERC licensing process. Staff explained the differences between the Traditional and ALP Processes, as well as FERC's requirements for Section 401 water quality certification and CZMA consistency review. Each state then explained, in some detail, their respective 401 WQC and CZMA processes.

Commission staff identified the goals of the two-day workshop as: (1) familiarize Commission staff with participating states' WQC and CZM processes and programs; (2) familiarize states with FERC's hydro licensing process; and (3) increase efficiency of processes by (a) identifying common attributes and (b) developing potential ways to integrate processes. The following represents a synopsis of the two-day workshop.

FERC LICENSING PROCESS - (Presented by Jarrad Kosa)

- ! Commission staff explained that the FERC is an independent agency under DOE, and is responsible for licensing the construction and operation of non-federal hydroelectric projects.
- ! FERC was established and derives its authority from the Federal Power Act. FERC jurisdiction over hydropower projects is affected by (a) U.S. lands, (b) navigable waters, and (c) interstate commerce.
- ! FERC is mandated by law to (a) give equal consideration to both developmental and non-developmental resources, (b) ensure that a hydro-power project is best adapted to the comprehensive development plan of a waterway, and (c) conduct an environmental review in accordance with the National Environmental Policy Act.

- ! FERC regulations stipulate that (a) FERC cannot issue a license without state water quality certification or a waiver, and (b) the water quality certificate is considered waived if not acted on within one year of the request for certification.
- ! If a project lies within or affects a state's coastal zone, (a) FERC cannot issue a license without a state's certification that the project is consistent with any applicable coastal zone management program, (b) CZMA requires the state to inform the Commission whether or not a project is consistent within 6 months of request.
- ! The Traditional Licensing Process typically takes about 5-8 years to complete, while the ALP takes about 4 years. Both licensing processes involve at least a 3-year pre-filing consultation period that begins with the issuance of an ICP (Initial Consultation Package), and is characterized by environmental studies and consultation. The Traditional Process is a rigid regulatory process, where additional information is almost always needed after an application has been filed and uncertainty as to environmental enhancements is common. The ALP is a flexible regulatory process that combines the pre-filing consultation and NEPA processes, improves communication among parties, and reduces the need for additional information as well as the uncertainty in the licensing process.
- ! FERC regulations require that the Section 401 WQC, request for 401 WQC, or waiver thereof, be filed along with the license application.
- ! An applicant for hydropower license, whose project lies within a state's coastal zone or otherwise affects the state's coastal resources, is required to file a consistency determination with the state CZM agency. The timing of this certification is not outlined in FERC's regulations, but typically an applicant files a consistency certification with the state at the time the license application is filed.
- ! The post-filing processing period is characterized by (a) staff's review of the license application, (b) NEPA scoping and review (includes preparing the environmental analysis), (c) several public notices and meetings, (d) additional information requests, if necessary, and (e) a 10(j) resolution process, if necessary.

NEW YORK'S SECTION 401 PROCESS - (Presented by Lenore Kuwik)

- ! New York considers state permits and state environmental review process to be pre-empted under the Federal Power Act. New York retains authority to condition the federal license through a Section 401 WQC.
- ! The regulatory process for 401 Certification is derived from New York's Uniform Procedures Act, the principal framework for regulatory review and decision making by the NY DEC. The process includes application requirements, regulatory time frames (45 or 90 days to review and reach a decision), public review and comments, as well as provisions for hearing.
- ! The NY DEC responds to consultation during course of application review; files intervention to obtain party status in FERC proceeding.
- ! The NY DEC makes a decision to issue, issue with conditions, or deny 401 water quality certification within 1 year of receipt of application (receipt determined by NY DEC staff).
- ! The completeness of a license application (or an application with incomplete information) is viewed as a problem, and will result in the NY DEC denying a WQC application. The NY DEC has developed a checklist which it uses to determine if a 401 WQC application is complete.
- ! NY DEC's Water Quality Certifications assert that FERC-licensed hydro-power projects will not contravene New York's water quality standards.
- ! The Water Quality Certifications are designed to (a) protect water quality, (b) maintain best uses of rivers, (c) protect fish species and habitat, and (d) create public access and recreational opportunities.
- ! Typical conditions included in a 401 WQC include (a) notification protocols, (b) minimum bypass and base flows, (c) flow monitoring, (d) impoundment fluctuations, (e) fish protection and downstream passage, (f) maintenance dredging, (g) sediment analysis and disposal, (h) erosion and sediment control, (I) construction drawdowns, (j) maintenance of river flow during construction, (k) placement of cofferdams and construction of temporary structures, (l) turbidity monitoring, and (m) public access.
- ! Settlement agreements are referenced in Water Quality Certifications.

- ! Review of and decisions on an application for water quality certification are made independent of Coastal Zone Management Program Consistency Review.

NEW YORK'S CZMA PROCESS (PRESENTED BY STEVE RESLER)

- ! The New York CZM agency (*i.e.*, Department of State) does not issue a permit or other certification. The CZM agency reviews the consistency certification filed by the applicant, then issues its concurrence or non-concurrence finding. The CZM agency informs the applicant and FERC of its decision.
- ! The CZM agency has 180 days to make a determination. The CZMA review does not start until the information package is complete, which includes, among other things, all necessary consultation and FERC's final NEPA document.
- ! New York reviews (a) effects to coastal resources, (b) which coastal zone policies apply, (c) the effect on those policies, and (d) how the proposed project is consistent with the policies. New York has 44 general coastal policies and additional local policies. New York does not balance between policies unless the consistency determination is appealed.
- ! Conditions are generally not included in New York's CZM determinations. The process is not consultative, and the decision is final. The basis for determination is the "effects test."

NEW HAMPSHIRE'S SECTION 401 PROCESS - (Presented by Paul Piszczek)

- ! The NH Department of Environmental Services, Watershed Management Bureau reviews applications for, and issues, Section 401 Water Quality Certifications.
- ! New Hampshire's Section 401 review focuses on temperature, dissolved oxygen, and flow. The NH DES determines information needs for other parameters (*e.g.*, areas known to be impacted by nutrients, heavy metals, organics, etc.), and determines project impacts under leakage and generation flows.
- ! During its review, the NH DES considers available data, and the age of that data. The NH DES determines project-specific limiting conditions (*e.g.*,

high water temperatures, low river flow) based on available data. Data gathered through continuous monitoring during several three-day or other discrete periods.

- ! The NH DES comments independently, as well as collaboratively with the New Hampshire Fish and Game Department, throughout the licensing process. Conditions relative to protection of fish and wildlife (*e.g.*, bypass flows and minimum downstream base flows) are typically incorporated in the 401 WQC.
- ! Relevant state permits are approved as part of water quality certification. Certifications are issued such that project operations will not violate surface water quality standards. Certifications are issued with conditions (*e.g.*, water quality monitoring, minimum flow releases, fish passage provisions, and additional studies, if necessary).
- ! The NH DES will issue a 401 WQC with adaptive management conditions in order to issue a certificate in a timely manner (*i.e.*, prior to a license application being filed). However, issuance of a 401 WQC may occur after a license application is filed, in which case up to 12 months may be necessary to review and issue a 401 WQC. The NH DES retains authority to amend the 401 WQC, and could revoke if adaptive management does not result in measures that will ensure compliance with state water quality standards.
- ! NH DES's 401 Certification process is characterized as follows: (1) FERC transmits Notice of Intent; the NH DES responds to the applicant with a copy of the 401 application form and regulations; (2) the applicant transmits the ICP; the NH DES reviews the ICP, attends public meetings, and transmits comment letter to applicant identifying study needs; (3) applicant prepares study plans and conducts studies; the NH DES reviews and comments on the study plans and study results; (4) the NH DES circulates a draft 401 WQC for review and comment, then issues a final 401 WQC with conditions, if necessary.
- ! A new or modified 401 Certificate is necessary for a recently licensed project if (a) the license is modified, or (b) a change is made to a project that increases the discharge or alters the quality of the discharge.
- ! The future of 401 Certification in New Hampshire will encompass (a) water quality in fish passage structures, (b) nutrients, (c) turbidity, (d) anti-

degradation, (e) dam removal concerns, (f) wetland creation/loss, and (g) biocriteria.

NEW HAMPSHIRE'S CZMA PROCESS - (Presented by Brian Mazerski)

- ! CZM review falls under the New Hampshire Office of State Planning. Along the main water bodies, the Coastal Zone boundary is 1,000 feet from the mean high water. Along the tidal rivers, the boundary is "all lands submerged, or flowed by mean high tide, any sand dune or vegetation therein, and, in addition, to those areas within 100 feet of the highest observable tide-line which border on tidal waters, such as, but not limited to, banks, upland areas, bogs, salt marches, swamps, meadows, flats, or other lowlands subject to tidal action."
- ! The same broad summary of CZMA processes/policies discussed in the NY CZM presentation applies to NH's CZM program.
- ! Any proposed project affecting any land/water use or natural resource of the NH Coastal Zone must be consistent with the NH Coastal Program. FERC can not issue a license until consistency is determined, normally within a 6-month (180 days) period. Should New Hampshire find that a proposed project is inconsistent with NH laws and policies, this determination can be appealed to the Secretary of Commerce.
- ! New Hampshire's CZM consistency review procedures involve (a) (pre) consultation with applicant, (b) receiving the application, (c) reviewing the proposed project against coastal policies/state laws, (d) a public notice/hearing, if necessary, (e) coordinate amendments, if possible, and (f) issue consistency determination (letter).
- ! In many instances, New Hampshire delays CZMA review for lack of information (or an incomplete application). The CZMA review does not start until the information package is complete, which includes, among other things, all necessary consultation, FERC's final NEPA document, the 401 WQC, wetlands permit, etc.

VERMONT'S SECTION 401 PROCESS - (Presented by Brian T. Fitzgerald)

- ! Vermont has no CZM Program. The Section 401 Certification program falls within the jurisdiction of the Vermont Agency of Natural Resources.

- ! Vermont's Section 401 Water Quality Certification process begins with issuance of the ICP by the applicant.
- ! An application for water quality certification is filed with the VANR at the same time as the license application is filed with FERC.
- ! In many instances, the VANR will seek a withdrawal and refiling of the 401 WQC application by the applicant. The reason is that, in general, final applications are not complete when filed with FERC; information needs (AIRs) are common.
- ! A draft 401 Certificate is issued for public comment. The legal notice period for the preliminary 401 decision is 30 days. The full text of the draft decision is made available to the public, including posting on the VANR's web site. Vermont usually schedules a formal public hearing on the preliminary decision, providing a 30-day notice for the hearing and an additional week for the filing of written comments. Occasionally, Vermont will hold a public informational meeting in advance of the hearing to discuss issues and explain the preliminary decision. If substantial changes occur between the draft and final Certificates, the final Certificate will be re-issued for public comment.
- ! In Vermont, the 401 Certificate is subject to appeal for 15 days following issuance of final Certificate.
- ! Vermont's 401 Water Quality Certifications consider the full range of designated uses (*i.e.*, aquatic habitat and biota, wildlife habitat, aesthetics, recreation, etc.).
- ! Vermont Water Quality Standards include hydrologic criteria for the protection of flow-dependent uses.

MAINE'S SECTION 401 AND CZMA PROCESSES - (Presented by Dana Murch)

- ! Maine's Section 401 Certification program is governed by three court cases. These court cases include: (a) Bangor Hydro-electric Co. V. Maine BEP, Decision No. 5899, docket No. CV-90-53 (Me. Sup. Jud. Ct.) (1991); (b) PUD No. 1 of Jefferson County v. Washington Department of Ecology, 114 S. Ct. 1900 (1994); and (c) American Rivers and Vermont v. FERC, 129 F.3d 99 (2nd Cir. 1997). The Maine Department of Environmental Protection is the 401 certifying agency.

- ! For the ME DEP, the Section 401 Certification review process begins when the agency receives a request (or application) for 401 water quality certification.
- ! If necessary, the ME DEP will seek a withdrawal and refiling of the 401 WQC application by the applicant. The reason is that, in general, the final applications are not complete when filed with FERC; information needs (AIRs) are common.
- ! The ME DEP needs a complete license application (including any requested additional information and analysis). The ME DEP indicates that FERC's NEPA document is not needed to make a complete application. The ME DEP's process is wholly separate from, and does not depend on, FERC's licensing process.
- ! The ME DEP does not conduct public meetings to receive comments on a draft 401 Certificate. Rather, the ME DEP seeks comments on a draft 401 Certificate through a public hearing process (includes noticing).
- ! Maine's CZM program falls under the auspices of the Maine State Planning Office. However, CZM review has been delegated to the ME DEP. The net effect, Maine's CZM consistency review is rolled into the Section 401 Water Quality Certification.

MASSACHUSETTS' SECTION 401 PROCESS - (Presented by Bob Kubit)

- ! The Section 401 certifying agency in Massachusetts is the MA Department of Environmental Protection.
- ! The 401 WQC application is filed with the MA DEP concurrently with the license application being filed with FERC. The MA DEP will seek the withdrawal and refiling of an application, if necessary.
- ! The 401 WQCs issued by the MA DEP address such issues as fish habitat, fish passage, bypass minimum flows and base flows, among others.
- ! The MA DEP uses the license application filed with FERC as the state's application for water quality certification.
- ! Massachusetts' 401 Certification process provides for public appeal of the issued 401 WQC.

MASSACHUSETTS' CZMA PROCESS - (Presented by Jane Mead)

- ! Massachusetts' CZM Program (CZM) is within the Massachusetts Executive Office of Environmental Affairs. CZM has been a cooperating agency with the FERC on a natural gas pipeline project.
- ! Since CZM's inception in 1978, no FERC regulated hydropower projects have been relicensed in the Massachusetts coastal zone.
- ! Federal consistency review is not initiated until the final Massachusetts Environmental Policy Act (MEPA) Certificate and final EIS are issued. CZM conducts a completeness review before initiating federal consistency review. CZM, however, may request additional information during the review process.
- ! CZM is a networked program and, as such, it has signed Memoranda of Understanding with other state agencies, incorporating CZM's program policies into agency regulations and decision-making. Thus, CZMA review and consistency determination is incorporated by reference by the licensing or permitting agency.
- ! The 1990 Amendments to the federal CZMA included language giving states with approved CZM program plans federal consistency jurisdiction over projects that may reasonably be expected to affect the land or water resources or uses of the state's coastal zone. Massachusetts amended its regulations in 1997 to extend its jurisdiction to coastal watersheds and contiguous state and federal waters.

JOINT DISCUSSION OF INTEGRATING STATES' WQC/CZM PROCESSES AND THE FERC LICENSING PROCESS - (Facilitated by Allan Creamer)

- ! For New York, New Hampshire, and Massachusetts, CZMA review does not start until the information package is complete, including all necessary consultation and FERC's final NEPA document. The States review (a) effects to coastal resources, (b) which coastal zone policies apply, (c) the effect on those policies, and (d) how the proposed project is consistent with the policies. The States do not balance in their review.
- ! The state CZM agencies state that FERC is required to license a project as certified by the CZM agencies. Licensing a project that differs would trigger a new review by the agencies.

- ! The States identified that the CZMA requirements are not addressed in FERC regulations. Therefore, applicants are not required to, and in many cases do not, consult during pre-filing consultation with the CZM agencies.
- ! The States have noticing and public hearing/meeting requirements as part of their processes. Maine indicated that joint notices and meetings would not satisfy its requirements. New York indicated that joint notices and meetings may not satisfy its legal obligations, but did not rule out the option. Vermont noted some difficulties, but indicated that joint meetings may be possible. Massachusetts affirmed use of FERC's scoping meeting as its public hearing (Massachusetts CZM has public notice requirements, but almost never has a public hearing. If a public hearing is necessary, the CZM program would make every effort to conduct joint hearing with the lead federal agency). New Hampshire issues 401 WQCs prior to application filing, consistent with the Commission's regulations.
- ! New York, Vermont, Maine, and Massachusetts agreed that if all necessary information is available and the license application is complete at the time of filing, they could issue 401 Certificates soon after (within 4 - 6 months) application filing.
- ! If all necessary information is not available and the application is not complete at the time of filing, New York, Vermont, and Massachusetts indicated that they could issue 401 Certificates within 4 - 6 months of FERC's Ready for Environmental Assessment Notice, provided that information/data needs had been met by that time. Maine suggested that it could meet this schedule as well, depending on workload and complexity of issues.

The States indicate that delays in their process are the result of incomplete applications. Incomplete applications result from (a) pre-filing disagreement among parties and/or (b) on-going studies that have not been completed prior to filing the license application. To facilitate the filing of complete applications, the following was discussed.

- ! FERC's proposed issuance of a pre-NOI letter (letter sent to an applicant prior to an applicant filing its notice of intent to relicense a project). The States agreed that this would be good. The letter would provide a list of agencies to be consulted, including the CZM agency, and would identify the issues that should be considered. The letter would describe basic study needs and emphasize the need to talk with appropriate agency personnel (regional biologists, as well as regulatory entity).

- ! Substantial improvements to the FERC Licensing Process, as outlined by the States, would involve: (a) assurance that the pre-filing period could accommodate two field seasons, which would improve studies and study results; (b) pre-filing milestones or deadlines (currently there are few, if any, time requirements between the NOI and the application filing deadline, and there appear to be no consequences for an applicant filing an incomplete application); (c) establishing time limits for FERC's review of the application before Additional Study Requests are issued and filed; and (d) FERC staff involvement pre-filing, including early communication with staff, staff review of studies and study plans, mediation, etc.

- ! It was suggested that the FERC should issue draft licenses for comment. It is believed that this could save time with re-hearings and post-license litigation. FERC Staff explained that draft license articles may be inferred by staff recommendations in the NEPA document.

Appendix A – List of Attendees
March 6 & 7, 2002, Northeast Workshop, Manchester, NH

<u>Name</u>	<u>Agency/Address</u>	<u>E-mail</u>
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